IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA, MUSINGA, M'INOTI & J. MOHAMMED, JJA.)

CIVIL APPEAL (APPLICATION) NO.61 OF 2012

BETWEEN

NYUTU AGROVET LIMITED..……..……..……....APPLICANT

AND

AIRTEL NETWORKS LIMITED…… RESPONDENT

(Being an application to strike out the Record of Appeal in the Court of Appeal of Kenya at Nairobi

in

Civil Appeal No.61 of 2012)

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RULING OF MWERA, J.A.

The facts leading to the present appeal can hardly be described as complicated. By an Agreement dated 20th December, 2007 the predecessor of the respondent company, ***Airtel Networks Kenya Ltd***, hereinafter ***Airtel***, then called Celtel, and at some stage Zain, entered into a distribution or sales agreement with the appellant, ***Nyutu Agrovet Ltd***, hereinafter referred to as ***Nyutu***, to distribute the former's telephony products – airtime and scratch cards in an area called Donholm Estate, Nairobi. The said agreement contained clauses including the manner by which orders for the goods would be placed and received. Clause 2.7 provided that each order accepted by ***Celtel*** (now ***Airtel***) should constitute a separate contract supplemental to the Agreement and breach of which could constitute a breach of the Agreement. Another Clause 13.7 provided that ***Celtel*** could not be liable for consequential damage of any kind as a result of the termination of the said Agreement or otherwise whether as a result of loss by the Distributor (***Nyutu***) of present or prospective profits, anticipated sales, expenditure investments, commitments made in connection with the Agreement or on account of any other reason or cause. In Clause 18.1 the parties agreed that:

> ***"…any dispute or claim arising out of or relating to the Agreement and/or breach thereof shall be determined by a Single Arbitrator to be appointed by agreement between the parties…"***

As either side read, understood and executed the Agreement, the parties got down to trade accordingly. ***Nyutu*** ordered for products from ***Zain*** (***Airtel***), and made payments in the bank account of ***Zain***. Along the line, so I understand, ***Nyutu*** took on one called ***George Changa*** as an agent or other, who then proceeded to order products from ***Zain*** using ***Nyutu's*** account. Between 9th and 16th March, 2009, ***Changa*** presented bank payment slips, amounting to Sh.11 million to ***Zain's*** employees, purporting to be a sum paid in the account of ***Zain*** by ***Nyutu*** to purchase ***Zain's*** products. Assuming that the payment slips were genuine, ***Zain*** delivered the products but eventually the said paying-in slips proved to be forgeries, whereupon ***Zain*** is said to have reversed the credits made which resulted in the debit in ***Nyutu's*** account, totaling Sh.11 million. That was the genesis of the termination of the Agreement followed by the appointment of a sole arbitrator, ***Fred O. N. Ojiambo,*** S.C. before whom both parties appeared, as per the agreement. The arbitrator delivered an award of Sh.526,720,698/50 in favour of ***Nyutu***. It was gleaned from the submissions and the award itself that the greater bulk of the award represented general damages which the arbitrator awarded on account of the tort of negligence on the part of ***Airtel***. There were other grounds stated in the award but not relevant here.

Accordingly, ***Airtel*** filed a notice of motion dated 8th November, 2011 under ***section 35 of the Arbitration Act*** to set aside the said award.

After due hearing by the High Court ***(Kimondo, J.***), the ruling delivered and dated 1st December, 2011, contained three main grounds which the learned judge decided: whether the arbitral award dealt with a dispute not contemplated by the parties; whether it had dealt with a dispute outside the terms of reference to arbitration and whether the said award was in conflict with public policy. In his decision the learned judge set aside the arbitral award in its entirety:

> ***"---purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for the reasons and deliberations above."***

In a memorandum of appeal containing eight grounds, ***Nyutu*** has moved by way of appeal, to challenge the ruling and orders of ***Kimondo, J.*** made following the hearing of a notice of motion to set aside, filed under ***section 35 of the Arbitration Act,*** hereinafter ***the Act***. Airtel does not think that such an appeal should lie and so it brought the present notice of motion dated 3rd May, 2014.

The main prayer in the motion is that:

> ***"The record of appeal filed in Civil Appeal No.61/2012 Nyutu Agrovet Ltd vs Airtel Networks Kenya Ltd be struck out."***

And the only ground on which the motion is premised stated that the record of appeal was filed out of time without any order to extend the period of filing and that the memorandum of

appeal contained argumentative matters. The ground added that the notice of appeal was served out of time and the lodgment of the record of appeal was a fraud upon the agreement between the parties and;

"---is further debarred by the provisions of the Arbitration Act."

Following the filing of the replying affidavit or for whatever reasons, the applicant,

Airtel, abandoned the other reasons in the grounds and what the parties argued before us, was whether an appeal lay from the High Court to this Court, following a decision made under section 35 of the Act.

Mr. F. Ngatia, learned counsel, leading ***Mr. S. Luseno*** for the applicant, ***Airtel***, presented the motion while ***Mr. N. Regeru***, learned counsel leading ***Mr. Nyaribo*** for the respondent, ***Nyutu***, resisted it.

In condensing his arguments, ***Mr. Ngatia***, told us that when the parties went before the sole arbitrator and thereafter before the High Court under ***section 35 of the Act***, the decision that followed was not subject to appeal to this Court by virtue of ***section 10 of the Act***. Referring to the written submissions, volumes of authorities in full or as digested, counsel told us that the Act did not confer the right of appeal on the appellant/respondent (***Nyutu***) which it was purporting to exercise and neither can that company take shelter and refuge under ***Article 164(3) of the Constitution,*** to come to this Court on appeal. Citing from the cases including ***Nova Chemicals Ltd vs Alcon International Ltd, H.C. Misc. Application No.1124/2002*** in which it was stated that the right of appeal is either conferred by statue or by leave and not by implication and ***Prof. Lawrence Gumbe & Another vs Hon. Mwai Kibaki & Others H.C. Misc. Application No.1025/2004, Mr. Ngatia*** told us that both those cases touched on the Arbitration Act and clearly by dint of ***section 10 of that Act,*** where a party was not invoking the powers donated by section 39 thereof, no court would intervene in matters governed by the Act. That section 35 fell out of the ambit of section 39 which parties agreed was not in issue in this appeal, accordingly no appeal lay from a decision made by the High Court under section 35. And quoting from the judgments of ***Omolo, J.A*** and especially ***Onyango Otieno, J.A***, in ***Kenya Shell Ltd vs Kobil Petroleum Ltd, Civil Application No. Nai.57/2006,*** it was said that section 10 is so clear as to discourage intervention of the courts even at the appellate level. That ***Onyango Otieno J.A.'s*** position was that if it was found necessary for this Court's intervention in decisions under section 35, that could only be if conditions under section 39(3) were satisfied. We heard that the foregoing was expressed in the ***Kenya Shell case*** decision of 7th April, 2006. But in the same case, the Court's decision of 10th November, 2006 was unanimous that when parties choose to resolve their disputes under the Act, by way of arbitral proceedings, the courts take a back seat. That the arbitral proceedings bestow the finality on disputes whereby a severe limitation is imposed on access to the courts, thereby as a matter of public policy, litigation is brought to an end.

Mr. Ngatia then cited the case of ***Anne Mumbi Hinga vs Victoria Njoki Githara CA 8/2009 (C.A)*** to emphasize that, indeed, the provisions of the Civil Procedure Act and the Rules thereunder, did not apply to arbitral proceedings under the Act, despite the provision of ***Rule 11 of the Arbitration Rules*** which could in no way override section 10 of the Act. We heard that the purport and content of section 10 excluded applications for leave to appeal to this

Court, as well as seeking stay of awards/judgments of arbitration. And that in essence, the Act was a complete and self-contained code that did not require aid from other legal provisions to give it effect. As for the enforcement of awards in which rule 11 of the Rules (above) comes into play, it cannot be said that the Civil Procedure Rules were imported wholesale to operate under the Act.

Mr. Ngatia continued that there was no prior agreement by the parties in terms of ***section 39(2) of the Act*** that the decision under section 35 herein would go to appeal and in any event such consent should only be within the parameters of that section 39.

There were more cases to support the applicant's stand that no appeal lies from the High Court decision under section 35, emphasizing that such a decision is final. The applicant placed before us more cases including ***Njoka Tanners Ltd & Others vs Industrial & Commercial Development Corporation NRI HC. Misc. Appl. No.8/2001***, ***Tony Mark Tanui vs Andrew Stuart & Another H.C. Misc. App.No.69/2012*** in support of this argument on finality.

Mr. Ngatia then argued whether the issue herein was one of jurisdiction of this Court or the right by the appellant to appeal a decision arrived at by the High Court making a finding under ***section 35 of the Act***. I heard counsel to be saying that although section 35 of the Act did not take away this Court's jurisdiction of appeal as conferred on it by the ***Constitution (Article 164(3))*** and the ***Appellate Jurisdiction Act (section 3(1)*** still ***Nyutu*** did not have the right to appeal to this Court from a decision under section 35. It was added that the jurisdiction of this Court could only crystalize to hear such an appeal if the right to appeal accrued to the appellant (***Nyutu***). It did not by dint of section 10 of the Act and section 35 did not state that such a right could accrue.

While appreciating the aspects of ***jurisdiction*** (the limits of power imposed on a court to hear and determine issues between parties before it) and the ***right of appeal*** (the right to entering a superior or higher court and invoking its aid and interposition to redress the error of the court below), I gathered from the argument the point that in this matter the issue was not whether this Court had the jurisdiction to entertain the present appeal but whether ***Nyutu*** had the right to come before us on appeal. It was stressed time and again, with the aid of case law, that the right to appeal is expressly granted by law and not by implication. And that a party must show which law donates the right of appeal intended to be exercised (***see Kakuta M. Hamisi vs Peris Pesi Tobiko (C.A. No.154/13***). And in this case, section 35 did not grant the right of appeal to ***Nyutu*** and it had not demonstrated any other statutory provision that accorded it such a right, thereby making its appeal herein incompetent, if not, a nullity. And from the long list of authorities cited by the appellant, suffice it to end with the case of ***Equity Bank Ltd vs Westlink MBO Ltd Civ. App. No.78/2011*** where the learned judges there made extensive references while appreciating the import of Article 164(3) of the Constitution. Counsel was of the overall impression that much as that provision in the Constitution, more than ever opened up the litigation field in Kenya, it did not grant litigants an automatic right to move to this Court, for such could not have been the intention of Kenyans to put in place an uncontrolled and unregulated gate valve for appeal. Filtering mechanisms were necessary and in arbitral proceedings section 10 applied, unless the matter fell under section 39 of the Act which was not the case here. Further references were made to the legal regime and cases falling under the

electoral area, land disputes resolutions and such other as appeared fairly relevant to the matter before us. We were urged to grant the prayer in the motion.

Then it was the turn for ***Mr. Regeru*** to reply. Similarly, the learned counsel made extensive references to the respondent's (***Nyutu***) submissions, full and digested authorities together with the provisions of law. While making distinction with the electoral cases cited e.g. the ***Timamy Issa Abdalla vs Swaleh Salim Imu & Others C.A. 36/2012*** and ***Hon. Basil Criticos vs IEBC & Others C.A. 33/13,*** as being irrelevant to arbitral proceedings as the one before us,

Mr. Regeru did not agree that section 35 of the Act excluded or did not provide the right of appeal. He told us that it did not debar such a right and accordingly, Article 164(3) permitting appeals to this Court generally, should be read with the statute which limited that right to entertain the appeal herein. That section 35 did not limit the right of appeal and decisions rendered under that section should be amenable to appeal. Without putting stress on the angle of the argument that section 10 of the Act may as well be unconstitutional, perhaps on reconsideration that ***Article 159(1)(c)*** recognizes and encourages forms of alternative dispute resolution including arbitration, counsel urged us to accept that though not specifically provided for or specifically debarred, section 35 should be read to mean that under it, a party has a right of appeal. ***Mr. Regeru*** exhorted us to appreciate and apply the time-honoured principle that the provisions of the Constitution should be read liberally, widely and purposefully so that justice is done. Technical construction of a constitution should be avoided especially where fundamental rights are concerned and right of appeal was such a right. Citing the cases including ***Kigula & Others vs Attorney General [2005] 1 EA at page 132***, ***Justice Joseph Mutava vs Judicial Service Commission & Another, Constitution Petition No.337/2013*** and the ***Equity Bank*** case above, we were told that it was imperative that Article 164(3), section 3(1) of the Appellate Jurisdiction Act as well as section 35 herein ought to be read as conferring a right of appeal on ***Nyutu*** - the right it was seeking now to exercise following the decision of ***Kimondo, J***. That in the case of ***Chief Lesapo vs North West Agricultural Bank*** (full citation not furnished), the Constitutional Court of South Africa expressed the strong sentiment that the right of access to court is fundamental and central to the stability of an orderly society to ensure that litigants do not resort to self-help means to resolve their disputes and that therefore:

> ***"As a result, very powerful considerations would be required for its limitation (access) to be reasonable and justifiable."***

Accordingly, without the clearest of terms that an appeal did not lie from a decision under section 35, nothing should limit ***Nyutu's*** right of appeal before us.

Mr. Regeru continued his argument by invoking the provisions of ***sections 3A, 3B of the Appellate Jurisdiction Act,*** to the effect that they are important, providing for the overriding object in the administration of justice in this Court so that oxygen, meaning life, is always breathed in matters before it. And that ***section 66 of the Civil Procedure Act*** conferred a right of appeal to this Court with or without leave. Further to that, on 1st December, 2011 ***Kimondo, J***. gave leave for the filing of the present appeal. That that order was not appealed and so it remains for the benefit of ***Nyutu***. It was repeated that ***section 35*** of the Act did not take away the jurisdiction of this Court to hear appeals under that section and ***Omolo, J.A*** in one of the

two ***Kenya Shell cases*** (above) had stated so. ***Mr. Regeru*** read out the contents of ***Rule 11 of the Arbitration Rules*** which permitted application of the Civil Procedure Rules in arbitration matters, where appropriate. And further that ***sections 12, 15 and 17 of the Act*** did specifically debar appeals from decisions made under them which is not the case with section 35. That the main reason for not expressly debarring an appeal under that section is that matters of setting aside an arbitral award are so monumental that they justify and warrant an appeal by an aggrieved party to this Court.

We were given several cases to demonstrate that this Court has in the past set the trend of hearing all types of appeals from the High Court in order to maintain consistency and certainty in the law. Therefore, that trend ought to continue with the present appeal. ***Mr. Regeru*** made further references to the ***Anne Hinga Case*** (supra), submitting that

Nyutu's appeal was not frivolous and it could not prejudice the respondent (***Airtel***). That the parties were agreed that ***section 39*** of the Act did not apply to this appeal – hence confining themselves to ***section 35*** only and that even if ***section 10*** set limitations as to access to the courts, section 35 did not. And more, that for the sake of great public importance and interest the present appeal ought to be heard so that the confusion that has so far reigned about the section 35 is cleared once and for all. That can only be done now by departing, from the past decisions.

Mr. Ngatia was then heard in a brief response and the Court rose to consider the decision. In my opinion the decision herein takes the following course. To begin with, it is not disputed that the mode to resolve disputes and particularly commercial ones by way of arbitration, is entirely the disputants' own choice. The State has set up the court system to resolve disputes but the larger commercial community has decided, for various reasons that it will in a consensual manner, take the resolution of whatever disputes that may arise in their transactions in their own way. And so by agreements duly executed and therefore binding on them, the business people and merchants place their disputes before a single or whatever number of arbitrators, again selected, appointed in their own way or in the way they agree on, to settle their disputes. It has been variously said that the reasons parties choose arbitration is to save time, money and resolve disputes in an "amicable' way. The jury may still be out on those reasons because some arbitration proceedings take long and cost colossal sums of money and many still find their way back into the courts the parties desired to avoid in the first place. But that is not the subject for the moment. For the moment, it is not in doubt that the international business community in its wisdom, formulated the ***UNCITRAL MODEL RULES*** of arbitration which most business countries like Kenya took into consideration to formulate their respective statutes. It is accepted without argument that the legislature considered, on behalf of the business community, that arbitration was actually a useful tool as a matter of public policy, to settle disputes. Accordingly, the Arbitration Act, (1995) was passed and then more importantly the people of Kenya in the ***Constitution 2010 (Article 159(1)(c)*** stated in one voice that the desire of the business community to prefer dispute resolution, not through the courts, but via their own agreed arbitration process was indeed a noble way. So I can say that the consensual, voluntary and preferred way of arbitration is a great idea. And because the commercial community desired to keep clear of the courts as far as possible, through Parliament, business people included in the Arbitration Act, only limited

instances to allow for court intervention when engaged in arbitration. To ensure that only limited court intervention would be allowed, the parties to any arbitration proceedings do state in the relevant agreement that the award issued will be final and binding. And to be certain in terms of the finality of an arbitral award, the business people told their representatives in the National Assembly to pass the Act which states, inter alia, that:

> ***"32A. Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided for by this Act."***

The recourse envisaged, in my view, includes intervention by the courts. If for instance the parties in an arbitral proceeding sought recourse to something like reviewing, varying or otherwise dealing with the award the way they desire themselves, then that would still be within the provision of ***section 32A***. However, because no arrangement can be perfect in all ways, and in my view, having the conduct and desires of the business people in mind, it was wise that the following section was incorporated in the Act:

"10. Except as provided in this Act, no court shall intervene in matters governed by this Act."

Matters governed by the Act are the ones touching on the formation of arbitration agreements, which are contracts between the parties voluntarily executed, which the court cannot remake for them; determining arbitrators; going for the arbitration itself; the issuance of the award so on and so forth. But then for one reason or another a matter may arise that requires the courts to intervene, and that may include questions of law arising in a domestic arbitration. So, section 39 was made part of the Act and how it operates. But that provision of law is not before us. The parties told us so and from this appeal, we note that only ***section 35*** stands to be adjudicated upon. Under this provision of law, parties may have recourse to the High Court against the arbitral award. It reads, in the parts relevant to this appeal thus:

"35. (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

2. ***(a) (i)… (ii) … (iii)…***

iv. ***the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration---."***

I set out and confine myself to that part of section 35 under which ***Kimondo, J.*** made his determination, the subject here, namely, setting aside the award. The award was made but ***Airtel*** felt that the High Court should intervene on the grounds it advanced and with respect to section 10. Section 10 mandates that seeking intervention of any court must be in accordance

with the Act. The intervention is confined to two courses only – via ***section 35*** and ***section 39*** as far as this appeal is concerned. ***Section 39***, is not in issue here. It confines itself to disputes of law and an appeal from the High Court lies to this Court.

How about a decision made pursuant to an application brought under section 35? We heard, and I have condensed the arguments for and against the point whether an appeal may lie from section 35 or not. Persuasive authorities have been advanced from and by either side for or against that point. My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators' award shall be final, it can be taken that as long as the given award subsists it is theirs. But in the event it is set aside as was the case here, that decision of the High Court final remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved. Despite the loss or gain either party may impute to, the setting aside remains where it falls. The courts, including this Court, should respect the will and desire of the parties to arbitration.

I do not agree that ***Article 164(3) of the Constitution***, ***section 3(1) of the Appellate Jurisdiction Act*** and even ***section 75 of the Civil Procedure Act,*** giving this Court ***jurisdiction*** to hear appeals from the High Court, should be read to mean that these provisions of law also confer the ***right of appeal*** on the litigants. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this Court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law then that court has no business to entertain the matter (see ***Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1***. This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not constitute the right to appeal. The right must precede leave.

And talking of this right to appeal with particular reference to proceedings under the Arbitration Act, ***Ringera, J***. as he then was, in the ***Nova Chemicals case*** (above) considered whether an appeal lay to this Court from an order made by the High Court under ***section 37(2)*** of the Act to furnish security. The judge said:

> ***"And in the context of the Arbitration Act section 10 thereof it is explicit that except as provided in that Act, no Court shall intervene in maters governed by the Act."***

He continued:

> ***"The point of departure must be the recognition that the right of appeal, with or without leave, must be conferred by statute and the same is never to be implied."***

Similarly, I hold the view that ***section 35*** of the Act, the subject herein, falls in the same category. To appeal on a decision made thereunder by the High Court does not create of itself the right to appeal to this Court.

And what the ***Prof. Lawerence Gumbe*** case (above) says of political parties who had filed a matter before a committee for arbitration mandated to settle their disputes finally, is specific and clear as to what that means:

> ***"The Court is prevented by section 10 of the Act --- from interfering in the arbitral process in any other manner except as set out in the Act and by extension the rules made under the Act."*** [Nyamu, J.]

The learned judge then remarked when leave was sought to appeal his decision to this Court:

> ***"I hold and rule that on the finding touching on Arbitration, there is no right of appeal to the Court of Appeal except in cases cited or circumstances cited in section 39 of the Arbitration Act."***

And more particularly in its ruling of 10th November, 2006 in the ***Kenya Shell*** case (above), this Court hearing a matter where ***Mutungi, J***. had dismissed an application under ***section 35(2)(a) (iv) of the Arbitration Act***, when Kenya Shell came here for leave to appeal, it was told:

> ***"Whether or not the Court could grant leave to appeal is a matter of discretion."***

The Court then considered the mechanisms set down by law for settlement of civil disputes – the ***Civil Procedure Act and Rules*** and the ***Arbitration Act*** and said the following:

> ***"A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to courts. sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Act are particularly relevant in this regard."***

Nyutu argues that ***Kimondo, J.*** gave it leave to come before this Court but the Act under which the subject matter fell, has itself limited or prescribed the manner in which to come before us. It has began by barring any intervention by any court, whatsoever in matters arbitral, but only allowed a limited scope within which to approach the High Court. Under section 35 it is not provided that an appeal lies to this Court. But under section 39, it has. Although section 35 does not debar an appeal to this Court as do sections 12, 15 and 17 of the Act, it does not mean that therefore it allows an appeal. Such should be stated expressly but not inferred or implied as ***Nyutu*** wants us to take it. I do not agree that that was what Parliament intended otherwise it could have said so as it did under section 39.

But I agree with what the Court pronounced about finality in the ***Kenya Shell*** case:

"The only ground taken up by the application to challenge the award was under section 35(2)(a)(iv) of the Act. --- At all events the tribunal was bound to make a decision that did not sit well with either of the parties. It would, nevertheless, be a final decision under section 10 of the Act --- We do not feel compelled therefore to extend the agony of this litigation on issues raised by the applicant."

And that is how I wish to put it in this matter. The sole arbitrator took a decision or made the award that the High Court set aside under section 35 of the Act. That decision may not be well taken by either party but it was final in terms of ***section 10*** of the Act.

Certainly, I do not agree that the ***Civil Procedure Act*** applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the ***Arbitration Act*** is a complete code excluding any other law applicable in civil-like litigation, I do not see where the Civil Procedure Act applies in this matter. ***Rule 11 of the Arbitration Rules*** states:

"11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules."

The subject, is only as far as it is appropriate ***Civil Procedure Rules*** shall apply to the ***Arbitration Rules*** – not the Act. In any event a rule cannot override a substantive section of an Act – section 10.

In the same breath I am not inclined to hold that the present appeal be considered to proceed before us by virtue of ***section 66 of the Civil Procedure Act*** which states that High Court decrees are appealable here. Or that ***sections 3A, 3B,*** the overriding objective provisions, give refuge to ***Nyutu***.

In conclusion, I reiterate that by the preponderance of existing material in law and case law to sustain the arbitration principle that intervention by court's participation in arbitral matters be strictly limited, leaving the parties to the proceedings to map their own paths out of their disputes, should be sustained and I so find. On my part, I find no uncertainty or confusion in the cases in which ***section 35*** has been considered in the past many of which were placed before us and I read them. Accordingly, the prayer sought in the present motion to strike out the appeal herein is granted with costs to the applicant.

Dated and delivered at Nairobi this 6th day of March, 2015.

J. W. MWERA

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JUDGE OF APPEAL

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IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWERA, MUSINGA, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPEAL (APPLICATION) NO. 61 OF 2012

BETWEEN

NYUTU AGROVET LIMITED.……..…….....APPELLANT

AND

AIRTEL NETWORKS KENYA LIMITED…….……..RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kimondo, J.) delivered on 1st December, 2011

in

H.C. MISC. APPL. NO. 400 OF 2011)

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RULING OF KARANJA, J.A.

Nyutu Agrovet Limited (appellant in the appeal, and respondent in this Motion) is a limited liability company which was engaged *inter alia* in the business of distribution of mobile telephony products which included scratch cards, mobile phone starter kits, mobile telephone handsets and other services related to mobile telephony. As its name explicitly suggests, it was also dealing with the sale and distribution of agrovet products.

The respondent in the appeal/ applicant in this motion, **Airtel Networks Kenya Limited** is also a limited liability company previously operating in the names Kencell Communications Limited , which later changed to Celtel Kenya Limited Zain and presently to Airtel Networks Kenya Limited. The two parties entered into a special distribution agreement **(Agreement)** on 6th April 2004 which was later renewed on 20th December 2007 and signed by both parties.

Of interest to us at this point in time is clause 18.1 of the said agreement which provided in part that;

"any dispute or	*claim arising*	*out of*	*or*	*relating to*	*this*
agreement and/or	*breach thereof*	*shall*	*be*	*determined*	*by a*

single arbitrator to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of such dispute by either party to the other upon application by either party to the chairman of the Charted Institute of Arbitrators

who shall appoint a single arbitrator to determine the dispute. The Arbitration shall be carried out in accordance with the provisions of the Arbitration Act 1995 or any statutory modification or enactments thereof. The Arbitrator's decision ***shall be final and binding on the parties".*** (emphasis supplied)

A dispute arose but it is not my place to delve into the nature of the said dispute for purposes of this ruling. Following the said dispute, the appellant moved the High Court by way of the plaint dated 19th May 2009.

In response to the said plaint, the respondent filed the *'conditional memorandum of appearance'*. This was meant to protect it against the court entering default judgment against it while at the same time not submitting itself to the court process and thereby waiving its right to have the dispute resolved by way of arbitration. After exchanging several correspondences, the Chartered Institute of Arbitrators in compliance with clause 18.1 of the arbitration Agreement, appointed Mr. Fred Ojiambo S. C. as the sole arbitrator to hear and resolve the dispute between the parties. The arbitrator heard the parties and made his arbitral award which is analogous to a judgment in a court of law.

Though not restricted to a specific format, for an arbitral award to be acceptable, it is required to be cogent, complete, certain, final, consistent and enforceable. Cogency in this respect would mean that the award must be compelling and convincing in its reasoning; complete in the sense that all issues submitted for determination to the arbitrator have been dealt with; certainty in that it must be clear and not ambivalent, ambiguous or not capable of being performed. An award must also be compliant with **Section 32 of the Arbitration Act 1995** (**the Act**).

If any party is unhappy with the award, then the same can be challenged in court under **Sections 35(2) of the Act** which has very clear provisions on the circumstances under which an award may be set aside.

On the issue of finality, under **Section 32A of the Act**, unless otherwise agreed by the parties, an arbitral award should be final and shall be binding on all parties to it and that there shall be no recourse against the award except as provided for in the Act. In this matter, as noted earlier on, Clause 18.1 of the Agreement provided that the decision of the arbitrator *"shall be final and binding on the parties"*. What this meant is that the award could only be interfered with by the court only as provided for under **Section 35 of the Act**. I shall advert to this issue of finality in more detail later in this Ruling.

Airtel Networks Kenya Limited moved the High Court for the setting aside of the award pursuant to that section, which application was allowed and the said award was set aside. I need not go into the details of the contents of the award or the reasons as to why it was set aside as that has been well covered in the Ruling of Mwera, JA.

After the ruling was delivered, Mr. Muriuki, learned counsel who appeared for the respondent, applied for leave to file an appeal against the orders of the court setting aside the award. Mr. Ngatia, learned counsel for the applicant, raised an objection saying that leave under section **35 of the Arbitration Act** was not an automatic right in law and that the principle of finality applied. The learned Judge (Kimondo, J.) after considering the

submissions of both counsel on that issue somehow decided not to be decisive about the matter and conveyed it to this Court in the following words:-

> "*It is always good practice to allow such a party however good or poor his journey to the appellate Court may look, to ventilate his rights. It will be a matter for the appellate court to determine whether the journey was a false start.*"

In my view however, the learned Judge should have been more decisive on this. A referee cannot see a false start at the starting blocks and still allow a party to race to the end only for the party to be told that he ought to have been disqualified the moment he stepped off the blocks!

This brings me to the notice of motion at hand. This notice of motion is not just about Nyutu Agrovet (respondent) and Airtel Networks Kenya Ltd (applicant). It is not a simple application arising from their contractual obligations *per se*. Rather, it raises an issue that transcends the contractual agreement creating the cause of action before the High Court and the appeal to this Court. It is not an everyday motion for striking out an appeal under **Rule 84 of this Court's Rules.**

The fact that it has been heard by a bench of five Judges underscores its importance. Its outcome will impact on how arbitration as an important alternative mechanism of dispute settlement is conducted in this nation. It would impact on both national and international trade in this country and chart the way forward, and also settle the contentious issue of the right of appeal to this Court from an arbitral award.

I say so because arbitration, as a commercial dispute settlement mechanism, is gaining popularity by the day in this country. The reason for this will come out later on as I delve into the gist of the application. In order to put this matter in its proper perspective, it is necessary for me to retrace the origin and evolution of arbitration in this country up to its current state before I can address the poignant issue as to whether a right of appeal lies to this Court in respect of a decision of the High Court made pursuant to **Section 35 of the Act**.

On its face, the notice of motion dated 3rd May 2012 seeks the striking out of the record of appeal filed in Civil Appeal No. 61of 2012 on the grounds that it was filed out of time without any order to extend the time of filing; the memorandum of appeal contains argumentative matters; the notice of appeal was filed out of time, and that lodgment of the record of appeal is a fraud upon the agreement made between the parties and is further debarred by the provisions of the Arbitration Act.

It is supported by the affidavit of Linda Kaai – Kiriko sworn on 3rd May 2012. It is opposed by the respondent vide the replying affidavit of Muchai Mathari sworn on 22nd June, 2012.

At the hearing of the motion, Mr. Ngatia learned counsel for the applicant appearing with Mr. Luseno, informed the Court that they were dropping all the other grounds and only pursuing the ground of lack of right of appeal and jurisdiction. The gravamen of his submissions is that there is no right of appeal to this Court from a decision of the High Court exercising its jurisdiction under **Section 35 of the Arbitration Act.**

It was Mr. Ngatia's submission that **Section 10 of the Arbitration Act** debars a party from moving to this Court on an appeal from a decision made pursuant to **Section 35 of the Act.** He further submitted, and that is common ground, that an appeal would only be to this Court if this was an appeal pursuant to **Section 39 of the Act** – which both parties concede it is not.

It was Mr. Ngatia's argument that the concept of finality is cardinal in arbitration matters and that is why unless an appeal to this Court falls within the purview of **Section 39 of the Act**, then it cannot lie to this Court. He cited several decided cases on that point but I shall come to that later.

On his part, Mr. Regeru, learned counsel for the respondent appearing with Mr. Nyaribo, in conceding that **Section 39** does not at all apply to these proceedings, urged us not to consider that section at all. He submitted, and I am in full agreement with him, that it is a condition precedent under **Section 39** that parties agree in advance to refer the matter to this Court on appeal in the event that the circumstances outlined in **Section 39 (2)** arise. It is not therefore necessary for me to address that point at all. Furthermore, I note that the same has been well covered by my brother, Musinga, JA. in his ruling.

The respondent's point of argument is that **Section 35 of the Act** should not be interpreted in a restrictive and limited way. He submitted that the provision must be given a broad and purposeful meaning; that the Court should consider other statutes that may aid this broad interpretation and particularly **Article 164(3) of the Constitution of Kenya 2010**; that **Section 10 of the Act** is unconstitutional in as far as it purports to debar a party from appealing to this Court against a decision of the High court under **Section 35 of the Act**. He also asked us to be guided by **Article 259**

(1) of the Constitution which engenders this Court to interpret the Constitution in a '*liberal, broad, generous and purposeful manner'.*

He submitted further that **Section 35** does not expressly debar a party from appealing to this Court, and that for a right of appeal to be taken away, the statute must state so. What I understood Mr. Regeru to be saying is that a right of appeal may be inferred where it is not expressly taken away by statute. Mr Ngatia was of the opposite view. His submission was that a right of appeal cannot be inferred from statute and that it must be expressly conferred. He also called in aid **Sections 3A** and **3B of the Appellate Court Jurisdiction Act,** and **Sections 2, 66,** and **75 of the Civil Procedure Act** saying that they apply to Arbitral proceedings, a contention that was strongly opposed by Mr. Ngatia. I will address these arguments shortly.

As stated earlier on, it is important to rehash the evolution of arbitration law in this country in order to put this matter in its proper perspective, and particularly on the concept of "finality" which is an important precept in the law of arbitration.

Arbitration is one of the dispute resolution mechanisms recognised under

Article 33 of the United Nations Charter. It is an internationally recognised form of dispute resolution particularly in the area of trade and commerce. It is a private consensual process which though adversarial in nature has been for many years a preferred mode of settling of international and commercial trade disputes. It is preferred by many parties who usually agree on the mode of appointment of the arbitrator long before a dispute arises. It is also meant to

be cheaper, faster and more confidential as compared to ordinary litigation. This is nonetheless debatable at present as arbitration is becoming more cumbersome, expensive and inefficacious as each day goes by.

The first arbitration law in Kenya dates way back to 1914 in the form of the Arbitration Ordinance 1914, which was a reproduction of the English Arbitration Act, 1889. This ordinance accorded courts in Kenya ultimate control over the arbitration process in Kenya. It was basically being used in resolution of commercial disputes as an alternative to litigation. The first Arbitration Act as we know it today was enacted in 1968 and was almost a replica of the Arbitration Act 1950 of the United Kingdom. This Act, like the U. K. Act provided too much intrusive powers to the courts to interfere with arbitral proceedings and the awards. This was contrary to the intention of the traders who intended that arbitration should be unfettered from the courts' intricate legal procedures which hampered efficiency in dispute resolution and resultantly slowed down growth in trade.

There was therefore a deliberate intention to reduce court influence in arbitration. This led to the adoption of the UNICITRAL Model arbitration law which led to the legal reforms repealing the 1968 Act replacing it with the Arbitration Act, 1995. The 1995 Arbitration Act is therefore based on the UNICITRAL Model.

This model was adopted in 1995 with a view to bringing our arbitral law within the globally acceptable and applicable practices and procedures. This was important because it would encourage foreign and international traders who would not feel smothered by the different procedures and circumstances prevailing in national judiciaries and other dispute resolution organs.

One of the aims of adopting the model law on International Commercial Arbitration was that the same would be acceptable to states with different legal, social and economic systems which would thus contribute to the development of harmonious international economic relations. The model constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.

Since its adoption by UNICITRAL the model law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on this model Law. Enviably, ours is one such Nation. It is axiomatic that the world is a global village and particularly when it comes to international trade.

It is important therefore that nations like ours that mostly thrive on international trade, and which also seek to woo foreign investors to their countries recognise and observe such legislation with fidelity. This boosts investors' confidence because they have faith in an internationally recognized system that will protect their investments in case disputes arise. They are also assured that an award resulting from such a system would be enforceable internationally.

It is important therefore to ensure that our arbitration law, which as it stands now, meets the specific needs of international commercial arbitration, remains undiluted and true to the international standards espoused by the UNICITRAL model which we have adopted. One important feature of arbitration which is internationally accepted and which is meant to make arbitration more attractive as opposed to litigation is the concept of finality. **Article 5** of the UNICITRAL Model Law on international commercial arbitration provides that;

"no court shall intervene except where so provided in law''

This provision is expressly mirrored in **Section 10 of our Arbitration Act, 1995.**

Almost all the other provisions are replicated. The setting aside of an arbitral award is provided for under **Article 34** and the grounds for setting aside are similar to those encapsulated in **Section 35** of our Act.

These two provisions are meant to ensure finality in arbitral proceedings, and forestall situations where parties who initially opted for arbitration to settle their disputes find themselves entangled in the quagmire of protracted endless litigation which they were trying to avoid in the first place.

Having given that background, I now come back to the Motion before us which must be viewed against this backdrop, the applicable law and the relevant case law cited to us by learned counsel in their very able submissions.

I will start with whether an appeal lies under **Section 35 of the Act**. I hold the view that there is no right of appeal under that section. I am in agreement with Mr Ngatia that a right of appeal must be conferred by statute. It cannot be inferred for the only reason that it has not been expressly denied. In this regard therefore, I beg to differ with Omolo JA in his observation in **Kenya Shell limited vs Kobil Petroleum Limited, Civil Appeal No. 57 of 2006 (unreported)** where he said:-

> *"For my part ,I am satisfied that the provisions of section 35 of the arbitration Act have not taken away the jurisdiction of either the High court or the Court of appeal to grant a party leave to appeal from a decision of the High court made under that section. If that was the intention there was nothing to stop Parliament from specifically providing in section35 that there shall be no appeal from a decision made by the High Court under that section"*

In my view the above observation could have been construed differently if they applied to any other statute. In this case the history of the law of arbitration I have given above clearly shows why no right of appeal was meant to be inferred from **Section 35 of the Act**-- the concept of finality and certainty in the arbitral process as envisaged in the UNICITRAL model which I have briefly referred to above.

Moreover **Section 35** does not exist in isolation and must be read together with

Section10. When that is done, one can clearly appreciate the buffer surrounding the arbitral process that the Arbitration Act has put in place. The reason for this is that although our Act is a national legislation, it must accord with the UNICITRAL model Law on which it was

modeled. It must accord also with the other international requirements and standards because it deals with both domestic and international arbitration.

Section 2 of the Act specifically provides that;

"*Except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic and international arbitration"*

Flowing from this is the question whether these proceedings can be subjected to our Civil Procedure Act. I hold the view that they are not. The clear provisions in the Arbitration Act cannot be displaced by the provisions of the Civil Procedure Act and Rules except as provided for in the Act itself as succinctly provided in **Section10** thereof. Moreover, **Rule 11** of the Arbitration Rules states that The Civil Procedure Rules shall apply to arbitral proceedings under the Act *"so far as is appropriate".*

This would apply where there is a lacuna particularly in the rules of procedure but cannot in my view override clear statutory provisions such as **Sections 10 and 35 of the Act.**

I hold the view that no right of appeal is provided for in arbitral awards save for matters pegged on **Section 39 of the Act**. I am convinced that a right of appeal is conferred by statute and cannot be inferred. On this point, I am in agreement with Omollo, JA in his decision in the **Kenya Shell** case (supra) where he stated;

> *"I agree with Onyango Otieno J.A that the right of appeal to this Court can only be conferred by statute and cannot be implied or inferred. That is now old hat*."

See also **Attorney General-vs-Shah** (No.4) (1971) E.A 50, and **Nova Chemicals Ltd vs Alcon International Ltd**, High Court Misc. Application No. 1124 of 2002 , and this Court's recent decision in **Kakuta Maimai Hamisi –vs- Peris Peris Tobiko & Others** Civil Appeal No. 154 of 2013, where it was held;

> *"It is enough to say that the right of appeal must be statute or other law based and so viewed there is nothing doctrinally wrong or violative of the constitution from such right to be circumscribed in ways that render certain decisions of courts below non appealable"* .

On the application of **Section 3A and 3B of the Appellate Jurisdiction Act,** this Court has pronounced itself succinctly in several matters on what has now come to be known as the "Oxygen Rule". It is not a panacea for all shortcomings (perceived or otherwise) in our laws to be applied with abandon even where there exists rules of procedure to cater for the situations in question. These provisions were not meant to replace any rules, but rather to complement them in instances where the law or applicable rules are deficient or otherwise insufficient. This Court's position on this issue was explicitly pronounced in the case of **Hunker Trading Company Limited vs Elf Oil Kenya Limited.** Civil application No. Nai. 6 of 2010. In the following words;

> *"It seems to us that the exercise of our powers under the "O2 principle" what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are*

"02" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the "02 principle" could easily become an unruly horse."

This court also stated in **City Chemist (Nbi) & Another vs. Oriental Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (Ur. 192/2008)** as follows:-

"that however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

That is definitely not the case here. The Arbitration Act is self-sufficient in itself, but where necessary it calls in aid Rules of procedure from the Civil Procedure Rules through **Rule 11 of the Arbitration Rules** but not otherwise.

On the issue of applicability of **Article 164 (3) of the Constitution**, that has been addressed very ably and in depth by my bothers Mwera, Musinga and M'Inoti JJ.A and I find it unnecessary to repeat the same. I would only emphasise that however much we would want to stretch it, Article **163(4)** is not a carte blanche for any litigant to come to the Court of appeal on any matter even where leave has hitherto been considered a pre-requisite. This in my view is not an obstruction to access to justice.

I also hold the view that **Section 10 and 35 of the Arbitration Act** must be interpreted within the context of the concept of finality as internationally recognized in arbitral proceedings conducted under the UNICITRAL model. They are not unconstitutional at all. Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration agreement into their contract, and at times even include the finality clause as was the case here.

When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails. That is what party autonomy, a concept that the courts treats with deference is all about.

This Court explained this issue clearly in **Kenya Oil Company Ltd & Anor-vs-Kenya Pipeline Company**, Civil Appeal No. 102 of 2012 in the following terms;

"The Arbitration Act, 1995 adopted the Model Law on International Commercial Arbitrations that was adopted in 1985 by the United Nations Commission on International Trade Law (UNITRAL). In addition to improving, simplifying and harmonizing practices in international commercial arbitration, the Act recognizes the principle of party autonomy and limits the role of the courts in commercial arbitration".

"The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend structures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had".

When parties expressly exclude court intervention in their arbitration agreement, then they should honour it and embrace the consequences. They cannot turn round and claim that the very law they have freely chosen to govern their business is unconstitutional. That is what the respondent is trying to do here. I would like to reaffirm this Court's decision in **Anne Mumbi Hinga vs Victoria Njoki Gathara**, Civil Appeal No. 8 of 2009 where the Court emphatically stated as follows;

"We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act".

In the same case, while addressing the requirement as to finality of an arbitral award, the Court observed that finality as a concept in arbitration is shared worldwide by states that have modeled their Act on the UNICITRAL Model like Kenya. It noted that the common thread running through all these Acts is the restriction of court intervention except where necessary and in line with the provisions of the Act. The Court went on to note that **Sections 35 and 37 of the Act** are wholly exclusive except where a particular clause invites the intervention of the Court.

This position for instance obtains in the United Kingdom, India, Canada, Australia, Germany, Ireland, the United States of America, Newzealand and other 60 plus countries which have adopted the UNICITRAL Model Law on international commercial arbitration.

In the United States Supreme Court decision in **Hall Street Associates, L. L.C., Petitioner vs Mattel Inc 552 U.S** (2008) the Court struck out an arbitration agreement that allowed the courts to overturn an arbitration award that contained legal errors or factual findings that were not supported by ' substantial evidence'. The Court argued that enhanced court review of arbitration awards "*opens the door to the full-bore evidentially appeals that render informal arbitration merely a prelude to a more cumbersome and time- consuming judicial review process".*

Our courts must therefore endevour to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNICITRAL Model. If we fail to do so, we may become what Nyamu J. (as he then was) in **Prof. Lawrence Gumbe & Anor –Vs- Hon. *Mwai Kibaki & Others,*** *High Court Misc. Application No. 1025/2004* referred to as*; "A Pariah state and could be isolated internationally*".

I think I have said enough to show that no appeal lies to this Court from the High Court under **Section 35 of the Arbitration Act**.

As Mwera, Musinga, M'Inoti, and J. Mohammed JJ.A are in agreement with this conclusion, the Notice of Motion dated 3rd May 2014 succeeds and the same is allowed with costs to the applicant, with the result that Civil Appeal No. 61 of 2012 is hereby struck out with costs of the Appeal to the respondent.

Before I conclude, I would like to commend counsel on both sides for their well-researched submissions, and the high level of preparedness and advocacy which was of great assistance to the Court in preparing this ruling.

Dated and delivered at Nairobi this 6th day of March, 2015.

W. KARANJA

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA, MUSINGA, M?INOTI & J. MOHAMMED, JJ.A.)

CIVIL APPEAL (APPLICATION) N0. 61 OF 2012

BETWEEN

NYUTU AGROVET LIMITED ……..
APPELLANT/APPLICANT

VERSUS

AIRTEL NETWORKS LIMITED …….RESPONDENT/APPLICANT

(Being an application to strike out the Record of Appeal in the Court of Appeal of Kenya at Nairobi

in

Civil Appeal No. 61 of 2012)

****

RULING OF MUSINGA, J.A.

1. The all important issue for determination in this application is whether in the absence of an express provision of a right of appeal in an arbitration agreement a party to arbitral proceedings has a right of appeal to the Court of Appeal from a decision of the High Court given under **section 35** of the **Arbitration Act, 1995**, (hereinafter "**the Act**").

2. The facts that gave rise to the appeal from which this application arises have been set out in *extenso* by my brother, Mwera, J.A., and I shall not repeat them. But in a nutshell, on 1st December, 2011 the High Court (Kimondo, J.) set aside an arbitral award of **Kshs.541,005,922.81** that had been made in favour of the appellant. The High Court decision was made in an application by the respondent pursuant to the limited intervention of a court

permitted by **section 35** of the **Act**. The parties had entered into a distribution agreement which at **Clause 18.1** stated that:

> ***"Any dispute or claim arising out of or relating to this agreement and/or breach thereof shall be determined by a single arbitrator….. The Arbitration shall be carried out in accordance with the provisions of the Arbitration Act, 1995 or any statutory modification or enactments thereof. The Arbitrator?s decision shall be final and binding on the parties."***

3. Immediately after delivery of the High Court decision, the appellant?s counsel made an oral application for leave to appeal to this Court. The application was resisted by the respondent?s counsel, who submitted that under the Act there was no right of appeal against such a decision.

4. The learned judge, in a brief *ex tempore* ruling, delivered himself thus:

"……It is always good practice to allow such a party however good or poor his journey to the appellate Court may look, to ventilate his rights. It will be a matter for the appellate Court to determine whether the journey was a false start. In the result, I am inclined to grant leave to the respondent (*now the appellant****) to file an appeal to the ruling of court of today?s date."***

5. The appellant then filed an appeal on 2nd April, 2012. The respondent filed an application seeking to strike out the entire record of appeal. Although the application was initially premised on several grounds, the only ground that was argued before us is whether under **section 35** of the **Act** an appeal lies from a High Court decision to this Court.

6. The parties filed comprehensive submissions as well as judicial authorities in support of their respective submissions. Thereafter, counsel were granted limited amount of time to highlight their written submissions and case law. **Mr. Ngatia**, learned counsel, who led **Mr. Luseno**, learned counsel for the respondent, set out the facts that gave rise to the commercial dispute between the two parties and commented on the decision reached by the High Court in setting aside the sole arbitrator?s award. He emphasized that the proceedings were instituted under the provisions of **section 35** of the **Act** which stipulate the circumstances under which an arbitral award may be set aside by the High Court. That section is an exception to the general principle laid out under **section 10** of the **Act** that no court shall intervene in matters governed by the Act.

7. Counsel added that **section 10** of the **Act** is a replica of **Article V** of the **UNCITRAL Model Law** and the purpose of that article is **"to achieve a certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitration, by compelling the drafters to list in the (model) law on international commercial arbitration all instances of court intervention"**. (See De.Binder P, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTION, 3rd Edition, Sweet & Maxwell pages 64-65.)

8. The above holding has been adopted by our local courts, Mr. Ngatia added, citing the decision of Nyamu, J. (as he then was), in **PROF. LAWRENCE GUMBE & ANOTHER**

vs. HONOURABLE MWAI KIBAKI & OTHERS, High Court Miscellaneous No. 1025 of 2004 where the learned judge held as follows:

> ***"Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally."***

9. Mr. Ngatia further submitted that under the Act, it is only **section 39** that gives conditional right of appeal to the Court of Appeal if a party is not satisfied by the High Court decision in an application brought under **section 35** of the **Act.** The section provides as follows:

"39. Where in the case of a domestic arbitration, the parties have agreed that—

a. ***an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or***

b. ***an appeal by any party may be made to a court on any question of law arising out of the award;such application or appeal, as the case may be, may be made to the High Court.***

2. ***On an application or appeal being made to it under subsection (1) the High Court shall—***

a. ***determine the question of law arising;***

b. ***confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.***

3. ***Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High***

Court under subsection (2)—

a. ***if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or***

b. ***the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).***

4. ***An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.***

5. ***When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned."***

10. The respondent contended that **section 39** cannot afford the appellant any refuge to this Court as the parties did not have any agreement that an appeal shall lie against the arbitral award and so the appeal does not lie. That position is not opposed by the appellant.

11. The respondent?s counsel cited a long line of authorities to the effect that a right of appeal can only be based upon a statute. Such cases include

> **KENYA SHELL LIMITED vs KOBIL PETROLEUM LIMITED, Civil Application NAI 57 of 2006,** and **NOVA CHEMICALS LIMITED v ALKON INTERNATIONAL LIMITED**, **High Court Miscellaneous Application No. 1124 of 2002.**

12. In the **KENYA SHELL** case, the question for determination was whether the Court of Appeal had jurisdiction to hear and determine an application for leave to appeal against an order made by the High Court pursuant to the provisions of **section 35** of the **Arbitration Act**. The majority decision (Omolo & O?Kubasu, JJ.A.) held that the provisions of **section 35**

of the **Act** do not take away the Court?s jurisdiction to hear and determine an application for leave to appeal. Omolo, J.A. held as follows:

> ***"For my part, I am satisfied that the provisions of section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant to a party leave to appeal from a decision of the High Court made under that section. If that was the intention there was nothing to stop parliament from specifically providing in section 35 that there shall be no appeal from a decision made by the High Court under that section."***

However, Onyango Otieno, J.A., in a robust dissenting decision held that the Court did not have such jurisdiction.

13. Mr. Ngatia respectfully disagreed with the position taken by Omolo, J.A., stating that parliament did specifically provide that no appeal is maintainable from a decision made under **section 35** of the **Act**. He cited **section 39(3)** which specifically states that **"notwithstanding sections 10 and 35 an appeal shall lie"** to this Court if the various conditions as stipulated thereunder are met. The word „**notwithstanding?** must be given its full effect, Mr. Ngatia stressed. To buttress that submission, he referred to the case of **BHARAT ALUMINIUM COMPANY v KAISER ALUMINIUM TECHNICAL SERVICE, INC. Supreme Court of India, Civil Appeal No. 7019/2005** where the court held:

"As submitted by Mr. Sorabjee, another principle of statutory construction is that courts will never impute redundancy or tautology to parliament".

14. The Supreme Court of India proceeded to quote with approval the judgment of Viscount Simon in **HILL v WILLIAM HILL (PARK LANE) LTD. [1949] AC 530** at page 546 as follows:

"When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which had not been said immediately before."

15. Mr. Ngatia submitted that by use of the word **„notwithstanding?**, parliament made it clear that the right of appeal conferred by **section 39** is an exception to the non-intervention policy which is the constant theme set out in the Act, and particularly **sections 10** and **35** thereof.

16. In **KENYA SHELL Limited v KOBIL PETROLEUM LIMITED** (supra), Onyango Otieno held that:

"The use of the words „notwithstanding sections 10 and 35? mean that this provision of section 39(3) is meant by the legislature to provide an exception to the provision of section

10 that no court should interfere in matters governed by the Act and as to section 35, the phrase is used to indicate that the decision of the superior court on an application for

setting aside can only be challenged in the Court of Appeal by way of an appeal if conditions in section 39(3) are satisfied.

….. ..

…….

In my mind it is an exception to the Arbitration Act requirement as enshrined in section 10 of the Arbitration Act No. 4 of 1995 and is the only way out for a party aggrieved by superior court?s decision under Section 35 of the Act.

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…….

Thus in my view other than as provided under section 39(3), this Court would have no direct jurisdiction donated by the Arbitration Act No. 4 of 1995 to entertain an appeal from an award given under the Act."

17. Although in the above quoted case the majority decision carried the day and thus the preliminary objection regarding this Court?s jurisdiction was dismissed, when the substantive motion seeking leave to appeal came up for hearing before Omolo, Waki & Onyango Otieno, JJ.A. the Court delivered itself thus:

"The Act, which came into operation on 2nd January, 1996 and the rules thereunder, repealed and replaced Chapter 49 Laws of Kenya, and the rules thereunder, which had governed Arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to the courts. Sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Act are particularly relevant in that regard.

……..

……..

…….

The matter before us has of course nothing to do with section 35 (2) (b) (ii) (supra). But, in our view, public policy considerations may enure in favour of granting leave to appeal as they would to discourage it. We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the arbitration Act under which the proceedings in this matter were conducted underscores that policy."

18. Mr. Ngatia submitted that the Court took a similar stand in a later decision, **ANNE MUMBI HINGA v VICTORIA NJOKI GATHARA, Civil Appeal No. 8 of 2009** when it held as follows:

"We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to

the High Court or the Court of Appeal against an award except in the circumstances set out in section 39 of the Arbitration Act."

19. Regarding the appellant?s contention that the jurisdiction of this Court to hear appeals from the High Court as provided for under **Article 164 (3)** of the **Constitution of Kenya, 2010 ("the Constitution"),** cannot be curtailed or limited by provisions of statute, Mr. Ngatia submitted that the "**jurisdiction**" of the Court is not synonymous to a **"right of appeal".**

This Court recently affirmed that position in **EQUITY BANK LTD v WEST LINK MBO LTD, Civil Appeal No. NAI 78 of 2011.** Similarly in **TIMAMY ISSA ABDALLA v SWALEH SALIM IMU & 3 OTHERS, Civil Appeal No. 36 of 2012**, this Court held as follows:

"Article 164(3) of the Constitution has to be read together with the Appellate Jurisdiction Act Cap 9 which is a statute specifically enacted to confer jurisdiction on the Court of Appeal. Section 3(1) of this Act states as follows:

„3. Jurisdiction of Court of Appeal

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law?

The Appellate Jurisdiction Act has introduced one qualification for the exercise of the court?s jurisdiction, that is, that the law must specifically provide for the right of appeal. Indeed both the Constitution and the Appellate Jurisdiction Act envisage an Act of Parliament giving a specific right of appeal and the scope of that right."

20. Responding to the respondent?s submissions, **Mr. Regeru**, learned counsel who led **Mr. Nyaribo**, learned counsel for the appellant, started by saying that there is no marked difference between this Court?s appellate jurisdiction and the right of appeal to the Court. In his view, the two concepts are closely interlinked and it is not possible to talk of either without referring the other. He cited **Article 164(3)** of the **Constitution** which, he said, grants jurisdiction to this Court to hear appeals from the High Court and any other court or tribunal.

21. Mr. Regeru however conceded that despite the general appellate jurisdiction that is donated to this Court by the aforesaid Article, statutes can restrict that general jurisdiction. He added that there is no express provision of law that debars an appeal to this Court pursuant to a decision made by the High Court under **section 35** of the **Act.**

22. Part of the above submission is however a sharp contrast to paragraph 18.9.1 of the appellant?s written submissions that:

> ***"Any statute that purports to limit that right of appeal is to that extent, unconstitutional. We would argue that the provision of section 10 of the Arbitration Act, which appears to limit the level of intervention of courts, is unconstitutional to the extent that it can be interpreted that there is no right of appeal from a decision of the High Court under section 35 of the Arbitration Act."***

23. Mr. Regeru urged this Court to interpret **Article 164(3)** of the **Constitution** in a broad, contextual and purposive manner as required by **Article 259(1)** of the **Constitution**. In that regard, he cited several cases, including **NDYANABO v ATTORNEY GENERAL [2001] 2 E A** and **KIGULA & OTHERS v ATTORNEY GENERAL, [2005] E.A.** He emphasized that access to justice is an important constitutional right and therefore **Article 164(3)** of the **Constitution** should not be interpreted in a manner that restricts that right. Counsel also made reference to the statutory jurisdiction of the Court as stated under **section 3(1)** of the **AppellateJurisdiction Act** that:

> ***"3.1 The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law."***

24. Turning to **section 66** of the **Civil Procedure Act**, Mr. Regeru submitted that it provides for a statutory right of appeal. The section states:

> ***"66. Except where otherwise provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."***

25. Further, **section 75(1)** of the **Civil Procedure Act** stipulates instances in which appeals from various orders lie as of right and others where appeals only lie with leave of the court. In the present case, counsel submitted, the High Court had granted leave to appeal against its decision and no appeal against that grant of leave had been preferred.

26. Mr. Regeru further submitted that **section 35** of the **Act** does not contain any express provision indicating that there shall be no right of appeal from a decision of the High Court under that section. The omission is deliberate and intended, he added. For illustrative purpose, counsel cited **sections 12(8)** and **15(3)** of the **Act** which expressly state that a decision of the High Court made thereunder shall be final and not subject to appeal. In his view, nothing prevents an aggrieved party from filing an appeal to this Court against a decision of the High Court made under **section 35.** In support of that submission, counsel cited the decision of Omolo, J.A. in **KENYA SHELL LIMTIED v KOBIL PETROLEUM LIMITED (supra),** where the learned judge stated:

> ***"But section 35 of the Act gives the High Court power to set aside an award where certain things are shown to have taken place. That is a serious matter and the interesting thing about section 35 is that there is no similar provision at the end of it as is the case in sections 12 and 17 which specifically bar appeals to the Court of Appeal."***

27. Counsel submitted that unless the right of appeal is expressly excluded by statute, this Court should hear such appeals. He cited several cases handled by the Court of Appeal on matters arising from **section 35** of the **Act**. Such cases include **KENYA OIL COMPANY LIMITED & ANOTHER v KENYA PIPELINE COMPANY LIMITED, Civil Appeal No. 102 of 2012**, **GITONGA WARUGONGO v TOTAL KENYA LIMITED, Civil**

Appeal No. 113 of 1998, DR. JOSEPH KARANJA & ANOTHER v GEOFFREY KURIA, Civil Appeal No. 130 of 2002, just to name a few.

28. In a brief reply, Mr. Ngatia stated that the overriding objective spelt out under **section 3A** of the **Appellate Jurisdiction Act** cannot confer a right of appeal where none exists. The same can be said of **section 66** of the **Civil Procedure Act**. The parties, on their own volition and in terms of the agreement between them, had decided to refer their dispute to arbitration, which is one of the dispute resolution mechanisms recognized by the Constitution. There are attendant benefits and consequences to that dispute resolution mechanism, he added.

29. Regarding the argument that leave to appeal had already been granted by the High Court, Mr. Ngatia submitted that the High Court stated that it was for this Court to determine whether any appeal lay to it.

30. Having summarized the arguments advanced by counsel in this appeal, it is evident that there has been no judicial concurrence as to whether the Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court given under **section 35** of the **Act.** There has been divergent views on the issue and it was deemed necessary that a five judge bench be constituted to consider whether this Court has jurisdiction to hear such appeals. The timeless words of Nyarangi, J.A. in **OWNERS OF**

MOTOR VESSEL LILLIAN „S? v CALTEX OIL (KENYA) LTD [1989] KLR 1, are apt:

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

31. In their written submissions, the appellant contended that **Article**

164. **(3)** of the **Constitution** gives this Court jurisdiction to hear appeals from the High Court and any other tribunal as prescribed by an Act of Parliament and therefore any provision of a statute that purports to curtail that jurisdiction is unconstitutional.

32. With great respect, I do not agree. Whereas the above cited Article of the Constitution generally gives the Court of Appeal jurisdiction to hear appeals from the High Court, that *per se* does not accord a party to arbitral proceedings a right of appeal save as provided for under the arbitration agreement and/or the Act. **Article 164** of the **Constitution** does not confer an automatic right of appeal in respect of each and every decision of the High Court. This Court so held in **EQUITY BANK LTD v WEST LINK MBO LTD (supra).** There is a clear distinction between the general jurisdiction of the Court to hear appeals from the High Court as conferred to it by the Constitution and a right of appeal which is vested on a litigant by statute and that right is not absolute, it may be ousted or circumscribed by statute. In

KAKUTA MAIMAI HAMISI v PERIS TOBIKO & OTHERS, Civil Appeal No. 154 of 2013, this Court held that:

> ***"It is enough to say that the right of appeal must be statute or law based and so viewed there is nothing doctrinally wrong or violative of the Constitution from such right to be circumscribed in ways that render certain decisions of courts below non appealable."***

33. Similarly, in **SAMUEL KAMAU MACHARIA & ANOTHER v KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR**, the Court stated:

> ***"An appeal is granted in specific terms by the Constitution or a statute. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A court of law cannot assume appellate jurisdiction where none has been specifically granted by the Constitution or statute."***

The Court proceeded to state that:

> ***"A court?s jurisdiction flows from either the Constitution or legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ….Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.***
>
> ***Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the***
>
> ***Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."***

I reject the appellant?s contention that its right to appeal to this Court is constitutionally guaranteed and cannot be curtailed by a statutory limitation.

34. **Article 159(c)** of the **Constitution** enjoins the Judiciary to promote alternative forms of dispute resolution including reconciliation, mediation and arbitration. To that extent, arbitration is constitutionally recognized as one of the methods of resolving disputes and where parties choose that route, the guiding law is the Arbitration Act. **Section 10** of the **Act** is explicit that:

> ***"Except as provided in this Act, no court shall intervene in matters governed by this Act."***

Kenya has adopted the UNCITRAL Model Law on international commercial arbitration which stipulates that courts of law cannot intervene in an arbitral process except in circumstances as provided by the law. Courts must instead play a supportive role. Our Arbitration Act provides for both domestic and international arbitration, see **section 2** of the **Act**.

35. Both Mr. Regeru for the appellant and Mr. Ngatia for the respondent were in agreement that the provisions of **section 39 (3)** of the **Act** cannot be invoked in this appeal to provide a right of appeal to the appellant because parties had not so agreed. In the absence of such an agreement the arbitrator?s decision is final and binding, unless set aside by the High

Court under **section 35** of the **Act**. **Section 39(3**), in my view, provides the only instance where the Court of Appeal can intervene after the High Court has pronounced itself on an application to set aside an arbitral award. It is important to interrogate the meaning of the word "Notwithstanding" as used under **section 39(3)** of the **Act**:

"(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection(2)-

(a) ……

(b) ……..."

36. To my mind, the contextual meaning of the word "Notwithstanding" as used above is **"inspite of"** or **"regardless of". Section 10** debars court intervention in arbitral proceedings except as may be permitted by the Act. The section is not unconstitutional, to the contrary, it affirms the Constitutional provision that requires the Judiciary to promote alternative dispute resolution mechanisms. To promote, in this context, means to

"further the progress of; support or encourage" the advancement of a concept. See Concise Oxford English Dictionary, 12th Edition page 1149. The Court would not be promoting arbitration if it kept on intervening in any of its processes, save as required by the Arbitration Act. That would be negating the spirit of the Act.

37. **Section 35** empowers only the High Court to set aside an award for reasons stated thereunder. That section makes no reference to the Court of Appeal at all. Nevertheless, **section 39(3)** permits the Court of Appeal to entertain an appeal against a decision of the High Court if the two conditions stipulated thereunder are satisfied. With respect, I do not agree with Mr. Regeru that the word "Notwithstanding" as it appears in **section 39 (3)** is redundant as far as interpretation of **section 35** of the **Act** is concerned. On the other hand, I agree with Mr. Ngatia that the right of appeal conferred by **section 39** is an exception to the non intervention policy, the running theme in the Act. To hold that the word

"Notwithstanding" as used in **section 39(3)** of the **Act** is otiose would not only be an absurdity but also a deliberate violation of an important principle of statutory interpretation that:

> ***"When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before."***

See **HILL v WILLIAM HILL (PARK LANE) LTD (supra).**

38. In conclusion, I am persuaded that the appellant herein has no right of appeal to this Court. Such an appeal can only lie if the parties had so agreed in advance in their arbitration agreement prior to the delivery of the award or if the Court of Appeal, being satisfied that a

point of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, which is not the case here.

39. No court should interfere in any arbitral process **except** as in the manner specifically agreed upon by the parties or in particular instances stipulated by the Arbitration Act. The principle of finality of arbitral awards as enshrined in the UNCITRAL Model law that has been adopted by many nations must be respected. The parties herein had agreed that the

Arbitrator?s decision shall be final and binding upon each of them. Since they did not agree that any appeal would lie, the appeal by the appellant is an unjustifiable attempt to wriggle out of an agreement freely entered into and must be rejected. *Afortiori*, in the circumstances aforesaid this Court lacks jurisdiction to entertain the appeal.

40. I would allow the respondent?s application dated 3rd May, 2014 and strike out this appeal with costs to the respondent.

Dated and Delivered at Nairobi this 6th day of March, 2015.

D.K. MUSINGA

……..

JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA, MUSINGA, M'INOTI & MOHAMMED, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 61 OF 2012

BETWEEN

NYUTU AGROVET LTD…….…….....…..APPELLANT/RESPONDENT

AND

AIRTEL NETWORKS KENYA LTD….....RESPONDENT/APPLICANT

(An application to strike out the Record of Appeal in the Court of Appeal at Nairobi

In

Civil Appeal No 61 of 2012)

****

RULING OF M'INOTI, JA.

The single issue for determination in this ruling is whether an appeal lies to this Court from a decision of the High Court under ***section 35 of the Arbitration Act, 1995 ("the Act")***. The facts leading to this application,as well as the arguments of learned counsel for the respective parties have been succinctly summarized in the ruling of my brother, Mwera, JA. and I need not repeat them.Suffice to stateas follows by way of background and context.

After a dispute between ***Airtel Networks Kenya Ltd (the applicant)*** and ***Nyutu Agrovet Ltd (the respondent)*** was referred to a sole arbitratorin accordance with the terms of a contract between them, the arbitrator ***(Fred N. Ojiambo, S.C.)***, on 2nd March 2011 awarded the respondent **Kshs. 541,005,922.81** and interest at ***16% per annum*** from 8th May 2009 till payment in full. The arbitration agreement expressly provided that the decision of the arbitrator shall be final and binding on the parties. Aggrieved by the award, the applicant applied,principally under ***section 35*** of the Act, to set aside the award. On 1st December 2011, the

High Court ***(Kimondo, J.)*** set aside the arbitral award after finding that the arbitrator had gone beyond the dispute referred to him by the parties.

Aggrieved by the decision of the High Court, the respondent filed in this Court ***CA No. 61 of 2012***. In response, the applicant filed the application now before us, seeking to strike out the appeal on the basis that no appeal lies to this Court. That application is the subject of this ruling. It is common ground between the parties that the dispute before the High Court was pursuant to section 35 of the Act and that section 39 of the Act is not applicable.

From the outset it bears emphasizing that the ***Constitution of Kenya, 2010*** now expressly recognizes arbitration as an alternative form of dispute- resolution and expressly demands that arbitration, among other dispute-resolution mechanisms, be promoted. Indeed, under ***Article 159(2) (c)*** of the Constitution, promotion of arbitration and other dispute-resolution mechanisms is one of the fundamental principles that guide courts in the exercise of the judicial authority conferred upon them by the Constitution.

It is noteworthy, too, that arbitration is expressly recognized by the Constitution as one of the mechanisms to be deployed in settlement of disputes affecting one of the most important pillars of the Constitution of Kenya, 2010, namely devolution. ***Article 189*** of the Constitution, which provides for cooperation and resolution of disputes between the national and county governments requires in ***Article 189(4)*** enactment of national legislation to provide procedures for settling intergovernmental disputes through alternative dispute-resolution mechanisms, including arbitration. The legislation that has been enacted gives primacy to arbitration and other dispute-resolution mechanisms before any resort to judicial proceedings.

Back to the application before us, the applicant contends that save for the right of appeal contemplated by ***section 39*** of the Act,there is no right of appeal to this Court from a decision of the High Court arising under section 35 of the Act. The respondent, on the other hand responds that there is such a right of appeal to this Court and invokes in support of that assertion, among others, ***Article 164(3)(a) of the Constitution*** which defines the jurisdiction of this Court and the general right of appeal conferred by the ***Civil Procedure Act, Cap 21 Laws of Kenya***.

It is clear beyond per adventure that the Act deliberately limits the instances in which the courts may intervene in arbitral proceedings. ***Section 10*** of the Act, for example, limits the courts' intervention in rather explicit and unequivocal terms as follows:

"10. Except as provided in this Act, no court shall intervene in matters governed by this Act."

Section 10 is borrowed word for word from ***Article 5*** of the ***United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985***. Regarding Article 5 of the Model Law, UNICTRAL in its ***Analytical Commentary on the Model Law*** observed as follows:

"Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system, which are not listed in the model law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision is to be expected seems beneficial to international commercial arbitration." (Emphasis added).

In ***PROF. LAWRENCE GUMBE & ANOTHER V. HON. MWAI KIBAKI & OTHERS, H. C. MISC.A. NO. 1025 OF 2004*** the High Court recognized the limited intervention by courts in arbitration proceedings when it stated:

"Our Arbitration Act, Section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented."

Another express provision, which underlines the principles of finality of arbitral awards and non-intervention of the courts in arbitral matters, save in the circumstances expressly allowed by the Act, is ***section 32A*** of the Act. That provision was introduced by the 2009 amendment to the Act and provides as follows:

> ***"Except as otherwise agreed by the parties, an arbitral award is final and bindingupon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."***

It is common ground that the application before the High Court to set aside the arbitral award, and which gave rise to the respondent's appeal which in turn this application now seeks to strike out,was taken out under section 35 of the Act. That section makes provision for the circumstances under which an arbitral award may be set aside by the High Court. The provision reads as follows:

"35. (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

4. ***An arbitral award may be set aside by the High Court only if-***

10. ***the party making the award furnishes proof-***

that a party to the arbitration agreement was under some incapacity; or

the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

v. ***the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or***

vi. ***the making of the award was induced or affected by fraud, bribery, undue influence or corruption;***

b. ***the High Court finds that-***

i. ***the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or***

ii. ***the award is in conflict with the public policy of Kenya.***

17. ***An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making the application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been dispose of by the arbitral award.***

18. ***The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."***

The following salient features of section 35 are worthy noting, all of which, in my opinion, further underline the deliberate policy of the Act to limit intervention by courts in arbitral proceedings. Firstly, section 35 sets out **"the only"** situations under which the High Court may set aside an arbitral award. The section provides a closed catalogue of circumstances that justify intervention by the courts in an arbitral award, leaving no room for intervention on grounds other than those stipulated in the provision. If I can use the term, for the purposes of intervention by the courts in arbitral proceedings, section 35 sets out the "absolute maximum" grounds for setting aside an arbitral award. Indeed in ***ANNE MUMBI HINGA V. VICTORIA NJOKI GATHARACA NO. 8 OF 2009*** this Court considered among others, the grounds upon which an application under section 35 can be sustained, and stated:

> ***"It is clear in light of the above provision that a party cannot ground an application to set aside an award outside section 35 of the Act."***

Secondly, the grounds upon which the courts may set aside an arbitral award are of a pretty serious nature, such as incapacity of a party; illegality of the arbitral proceedings; breach of the rules of natural justice; excess of jurisdiction; fraud; bribery; corruption; undue influence and breaches of public policy. The serious nature of the grounds recognized to justify setting aside an arbitral award serves, in my view, to eliminate run-of-the mill complaints, grievances and disaffections as basis for intervention.

Thirdly, the deference with which the arbitral award is held in the Act is underlined by the fact, made clear by ***section 35(2)(a)(iv),*** that even where the arbitrator has exceeded his or her jurisdiction, if it is possible to sever the part of the award that is properly within the remit of the arbitrator from that which is not, the court must opt for that approach. The effect is to respect and uphold the part of the award that is properly within the arbitrator's mandate, without allowing it to be undermined or contaminated by the one that is not.

Fourthly, the provision empowers the High Court to suspend proceedings before it, which seek to set aside an arbitral award, so as to give the arbitrator an opportunity to rectify any faults, which would have otherwise justified intervention by the court. In this provision, one sees the court being required, as much as possible, to exercise restraint in intervening in arbitral awards and proceedings and to give the arbitration process opportunity to resolve the dispute. In other words, the courts are being requested, as much as possible, to defer to arbitration.

Fifthly, section 35 provides a strict time frame within which the application seeking the intervention of the High Court in arbitral awards must be made. Failure to observe the prescribed time limit leads to forfeiture of the right to question the award or to ask the High Court to intervene. This Court appreciated this time limit in ***ANNE MUMBI HINGA V. VICTORIA NJOKI GATHARA (supra)*** in these terms:

> ***"Besides the issue of jurisdiction as explained above, Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award. The last date for the challenge was 15th February 2008. All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction."***

Lastly, section 35 does not provide a party, who is aggrieved by a decision of the High Court in the exercise of the powers conferred by that provision, a right of appeal to this Court. The provision is completely silent on the right of a further appeal. Thatsilence raises a fundamental question whether the failure of the provision to provide expressly for a right of appeal to this Court, while the provision is otherwise very clear in its policy and intent to limit intervention by the courts in arbitral awards, is a deliberate choice or an accidental omission. That really is the crux of this application.

Unlike section 35, section 39 of the Act makes provision for appeals to this Court, in the following terms:

"39 (1) Where in the case of a domestic arbitration, the parties haveagreed that-

a.

an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

b.

an appeal by any party may be made to a court on any questionof law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.

2. ***On an application or appeal being made to it under subsection (1) the High Court shall-***

(a) determine the question of law arising;

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

3. ***Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)-if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or the Court of Appeal, being of the opinion that a point of law ofgeneral importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).***

4. ***An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of the applicable, as the case may be, in the High Court or the Court of Appeal.***

5. ***When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned."***

Under section 39 of the Act, intervention by the courts in arbitral proceedings or awards is predicated upon ***agreement*** by the parties themselves. Where therefore the parties have agreed to refer any question of law arising in the course of the arbitration to the court, or to appeal any question of law arising from an award to the court, the High Court will properly assume jurisdiction. The point to emphasize for the purposes of this ruling is that under section 39 the courts will still not intervene in arbitral proceedings unless the parties have agreed to such intervention. Again, in my view, out of deference to arbitration, even in cases where the High Court is properly seized of a matter arising from arbitral proceeding sunder section 39, the court is empowered, if it deems it appropriate, to refer the matter back to the arbitrator for reconsideration or to a new arbitrator, when one has subsequently been appointed.

The right of appeal to this Court is created by ***section 39 (3)*** of the Act. That right is not automatic; on the contrary, it is fairly circumscribed. For the right of appeal to arise, the High

Court must have made a determination in arbitral proceedings under section 39(2) of the Act, (i.e., the parties have agreed to refer questions of law arising in the arbitral proceedings or in the arbitral award to the High Court, and the High Court has determined the issue or referred it back to the arbitrator or a newly appointed arbitrator for determination).Moreover, to entitle any of the parties to appeal to this Court against the determination of the High Court, the parties must have agreed ***prior*** to the making of the arbitration award that an appeal would lie to this Court from the determination of the High Court. Beyond that, the only other instance when an appeal would lie to this Court from a determination of the High Court under section 39(2) is where this Court has granted leave to appeal on the ground that a point of law of general importance, the determination of which will substantially affect the rights of any of the parties, is involved in the intended appeal.

If section 35 is considered together with section 39, is there any basis for the assertion that there is a right of appeal to this Court from a determination of the High Court made under section 35? In the first place I have noted that section 35 does not expressly provide such right of appeal. On the contrary its intention to limit intervention of the courts, including intervention by appellate courts like this Court, in arbitral awards is readily apparent. In my opinion, the clearest indication that there is no right of appeal provided for under section 35 and that no such right of appeal was intended lies in the terms of section 39(3) of the Act, which provides for the right of appeal to this Court.

That section provides for the circumstances when an appeal lies to this Court from a determination of the High Court, ***"Notwithstanding sections 10 and 35."*** I agree that the effect and implication of the words ***"Notwithstanding sections 10 and 35",*** as submitted by the applicant's learned counsel, ***Mr. Fred Ngatia*** who led ***Mr. Steve Luseno,*** is that both sections 10 and 35 of the Act do not allow an appeal to this Court. However, where the circumstances provided for in section 39(3) arise, there is a right of appeal, *irrespective of,* or *in spite of* the prohibition of appeals by section 10 and 35. The phrase ***"Notwithstanding sections 10 and 35"*** in section 39(3) means that an appeal is permitted under section 39, without being affected by the bar or prohibition of appeals in sections 10 and 35. Those words in section 39 cannot, with respect, be the basis for arguing that there is a right of appeal recognized in section 35. Properly interpreted, it means quite the very opposite, namely that there is no right of appeal conferred by sections 10 and 35.

In his robust dissent in ***KENYA SHELL LTD V. KOBIL PETROLEUM LTD. CA NO. NAI 57 OF 2006, Onyango Otieno, JA***. was of the same mind when he expressed himself thus:

> "***"This (section 39(3)) is the only provision in the Arbitration Act No. 4 of 1995 giving the Court of Appeal jurisdiction to hear an appeal from the superior court on matters governed by the Act. The use of the words "Notwithstanding sections 10 and 35", to me means that this provision in section 39(3) is meant by the legislature to provide an exception to the provisions of section 10 that no court shall interfere in matters governed by the Act and as to section 35 the phrase is used to indicate that the decision of the superior court on an application for setting aside can only be challenged in the Court of Appeal by way of an appeal if conditions in section 39(3) are satisfied."***

The rationale behind the limited intervention of courts in arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to chose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through arbitration, intervention by the courts in the dispute is the exception rather than the rule. In ***KENYA OIL CO LTD & ANOTHER V. KENYA PIPELINE CO. LTD., CA No 102 of 2012***, this Court expressed itself as follows on the principle:

"The Arbitration Act, 1995 adopted the Model Law on International Commercial Arbitrations that wasadopted in 1985 by the United Nations Commission on International Trade Law (UNCITRAL). In addition to improving, simplifying and harmonizing practices in international commercial arbitration, the Act recognizes the principle of party autonomy and limits the role of the courts in commercial arbitration. The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend strictures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had."

Clearly, then, if it were the intention of the Act that the courts should intervene in arbitrations without let or hindrance, profound provisions such as sections 10 and 32A, or the limits inbuilt in sections 35 and 39 would be utterly unnecessary. It is equally self-evident to me that arbitration would serve no useful purpose as an alternative to judicial proceedings, expressly recognized by the Constitution, if the courts were allowed to intervene willy-nilly in arbitrations.

Notwithstanding the above provisions of the Act and in particular the silence of section 35 on a right of appeal, the respondent still vigorously contends that there is a right of appeal to this Court. ***Mr. Njoroge Regeru***, learned counsel who led ***Mr. J. Nyaribo***, for the respondent, astutely and boldly pressed various innovative arguments towards that end.

The first contention is that the Act cannot validly oust or limit the jurisdiction of the courts. It is argued that courts are always reluctant to recognize ouster clauses unless they are in the clearest of terms. That argument is at first sight an attractive argument. Judicial reluctance to recognize ouster clauses is well demonstrated in a consistent line of cases which the respondent relies upon, such as ***DAVIS & ANOTHER V. MISTRY [1973] EA 463, PYX GRANITE CO. V. MINISTRY OF HOUSING & LOCAL GOVERNMENT & ANOTHER [1958] 1 ALL ER 625, BOARD OF GOVERNORS OF THE LONDON HOSPITAL V. JACOBS [1956] 2 ALL ER 603*** and ***NDYANABO V. ATTORNEY GENERAL [2001] 2 EA 485.***

Upon closer scrutiny, however, and in particular in the context of arbitral proceedings, the argument is not, in my opinion, easily sustainable. The decision to settle for arbitration as the dispute resolution mechanism of choice is one that is consciously and deliberately taken by the parties. In settling for that mode of dispute resolution, the parties know the limits that are placed on their right to resort to the courts once they have opted for arbitration. In other words, by settling for arbitration, it is the parties who have by their own deliberate choice

opted to oust the jurisdiction of the courts or otherwise limit the right of the courts to intervene in their dispute.

It appears to me pretty obvious that parties who have deliberately chosen arbitral proceedings as their preferred dispute-resolution mechanism are on a totally different footing from the ordinary citizen who finds his or her right to access a court limited by a statute without any choice on his or her part. In the latter instances, the courts have been loath to accept ouster of jurisdiction except in the clearest of cases. With respect, that reasoning cannot be so easily extended to arbitration proceedings in the way that the respondent is inviting us to do. Parties cannot settle for arbitration, which they know very well does not readily brook judicial intervention and then turn round and complain that the limitations inherent in their chosen dispute-resolution mechanism is illegal or contrary to public policy. As the Court of Appeal of New Zealand stated in ***CBI NZ LIMITED V. BADGER CHIYODA*** ***[1990] LRC 621*** in arbitral proceedings, there is nothing contrary to public policy in the finality of the arbitrator's award.

I would add that in light of the express recognition of arbitration as an alternative dispute resolution mechanism by the Constitution of Kenya, the clear legislative intent on finality of arbitral awards as manifested in the provisions of the Arbitration Act,as well as the rationale behind the finality of arbitration awards very well articulated by my sister, Karanja, J.A in her ruling, there is nothing illegal or unconstitutional about the limitation of judicial intervention in matters that are subject to arbitration. It should also not be forgotten that the Arbitration Act allowed the parties to this dispute, by agreement, to provide for a right of appeal to this court, which option they chose not to invoke. I would accordingly not hesitate in holding that the cases on ouster of jurisdiction relied upon by the respondent are of little assistance in the present circumstances.

The respondent's second contention is that section 35 does not ***expressly*** prohibit the right of appeal to this Court. In other words, the right of appeal must be ***implied***, because it is not expressly prohibited. To buttress the point, it is argued that where the Arbitration Act permits an application to the High Court and does not allow an appeal to this Court, such as under ***sections 7(8), 14(6), 15(3), 16(3)*** and ***17(7),*** the Act expressly provides that the decision of the High Court shall be final and shall not be subject to appeal. If it were intended that there should not be any right of appeal under section 35, it is concluded, a similar express bar would have been deployed. The respondent's argument in this regard finds favour in the views of ***Omolo, JA***, for the majority in ***KENYA SHELL LTD V. KOBIL PETROLEUM LTD.*** ***(supra)*** where the learned judge stated:

> ***"For my part, I am satisfied that the provisions of section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant a party leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in section 35 that there shall be no appeal from a decision made by the High Court under that section. Parliament specifically so provided under various sections already set out herein."***

In my view, the Act itself does not leave any room for implying the right of the court, including an appellate court, to intervene in arbitral awards or proceedings. On the contrary, the Act expects that instances where intervention by the courts, including by this Court, is permitted will be expressly provided. In the absence of express grant, there is no room, in my opinion, for an implied right of intervention in arbitral proceedings. Consequently, that in some instances the Act has expressly stated that there is no right of appeal to this court cannot, *ipso facto* prove or establish the converse proposition, namely that where the Act is silent on the right of appeal, the same is allowed. The express provisions of, and the policy behind the Act are sufficiently clear that overall the right of intervention by the Courts in arbitral proceedings cannot be implied. It has to be expressly provided.

There are also very consistent decisions of this Court that the right of appeal will not be implied but must be expressly provided for in a statute. In ***RAFIKI ENTERPRISES V. KINGWAY TYRES LTD. CA NO. NAI. 375 OF 1995***, this Court expressed itself thus, on the issue:

> ***"…[I]t is now trite that a right of appeal must be expressly given by law and such a right cannot be implied or inferred."***

Other cases in which that view has been upheld include, ***HARNAM SINGH BHOGAL T/A HARNAM SINGH & CO V. JADYA [1953] 20 EACA 17, ANARITA KARIMI NJERU V. THE REPUBLIC (NO. 2) (1976-80)I KLR 1283, MUNENE V. REPUBLIC (NO. 2) [1978] 105, TELKOM KENYA LTD. V KAM CONSULT LTD. & ANOTHER CA NO. NAI 55 OF 2002, EQUITY BANK LTD. V. WESTLINK MBO LTD CA NO. 78 OF 2011*** and ***KAKUTA MAIMAI HAMISI V. PERIS PESI TOBIKO & 2 OTHERS CA NO. 154 OF 2013.*** I will revert to this issue later in considering the respondent argument premised on Article 164 (3) of the Constitution and the jurisdiction of this Court

I would add, too, that to adopt the approach proposed by the respondent amounts to totally ignoring the words ***"notwithstanding sections 10 and 35"*** in section 39(3) of the Act. Ignoring the clear words in a statute would be contrary to the basic canon of statutory interpretation that requires a statute to be read holistically and in a manner that avoids rendering any of its provisions superfluous or unnecessary. In ***HILL V. WILLIAM HILL (PARK LANE) LTD.[1949] AC 530 at 546,Viscount Simon*** stated that:

> ***"When the legislature enacts a particular phrase in a statute the presumption is that it is saying something, which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something, which has not been said immediately before."***

And in ***PLACER DOME CANADA V. ONTARIO (2006) 1 SCR 715***, the Supreme Court of Canada observed that under the presumption against tautology in the interpretation of statutes, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.

The respondent's next contention is founded on what it calls the Court of Appeal practice. The gist of the argument is that there are a number of cases where this Court has entertained appeals from the High Court in arbitral proceedings, even though the provisions of the Arbitration Act under which those appeals arose did not provide for a right of appeal to this Court. Among those cases he cites ***GITONGA WARUGUONGO V. TOTAL KENYA LTD, CA NO. 113 OF 1998***; ***DR. JOSEPH KARANJA & ANOTHER V. GEOFFREY NGARI KUIRA, CA NO. 130 OF 2002; UNIVERSITY OF NAIROBI V. N.K. BROTHERS LTD, CA NO. 308 OF 2002*** and ***UAP PROVINCIAL INSURANCE CO. LTD V MICHAEL JOHN BECKETT, CA NO. 26 OF 2007***. This line of cases, the respondent submits, demonstrates the Court of Appeal practice, which recognizes a general right of appeal under the Arbitration Act.

I have carefully perused those decisions. In none of them was the jurisdictional question raised, either by the parties or by the court *suo moto*. Accordingly, they cannot be authority for the proposition that there is a right of appeal from the High Court to this Court in all disputes under the Arbitration Act. Again it must be borne in mind that hitherto there have been conflicting decisions on the issue as demonstrated by the majority decision of this Court in ***KENYA SHELL LTD V. KOBIL PETROLEUM LTD (supra).***

The respondent's fourth argument is that even though there is no express right of appeal provided by the Act in the circumstances of the present case, ***section 66 of the Civil Procedure Act*** otherwise gives the respondent the right of appeal to this Court. That provision states as follows:

> ***"Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."***

It is posited that so long as there is a decree or order of the High Court in arbitral proceedings or any other proceedings, the above provision creates a right of appeal to this Court. For good measure, the respondent also invokes ***rule 11 of the Arbitration Rules***, which provides that in so far as it is appropriate, the Civil Procedure Rules shall apply to all arbitration proceedings.

The respondent's view that there is a right of appeal to this Court from arbitration proceedings founded on the Civil Procedure Act and also finds support in the majority opinion of ***Omolo, JA*** in ***KENYA SHELL LTD V. KOBIL PETROLEUM LTD (supra).*** The learned judge held that the Civil Procedure Act is an Act of general application in all civil matters, including arbitration matters and therefore section 75 applied to enable an appeal to this Court. His lordship reasoned that since the Arbitration Act was the later Act than the Civil Procedure Act, if Parliament had intended that section 75 should not apply to arbitration proceedings, it would have specifically provided so.

That opinion contrasts with the dissenting view of ***Onyango-Otieno, JA*** who expressed himself as follows on the issue:

> ***"I agree that the Civil Procedure Act is an Act of general application in civil matters but it would only be applied in civil matters that do not have specific***

> ***provisions entrenched providing for what appeals can be entertained by this Court. Its provisions cannot override any specific provisions of an Act of Parliament, which had made specific limitations on a matter such as the right of appeal, neither can it override the spirit of another Act…In the matter before us, the provisions of the arbitration Act limits the appeals to the Courtof Appeal and ties the same to certain conditions precedent. It would be wrong to use rule 11 to inject Civil Procedure Rules and worse still the Civil Procedure Act into Arbitration Act No 4 of 1995, as that would provide inconsistency in the provisions of the Arbitration Act No 4 of 1995."***

Like ***Onyango Otieno, JA***, I am not convinced that, in view of the express terms of the Arbitration Act, that it is possible to found a right of appeal to this Court in the Civil Procedure Act. The Arbitration Act is a specific code on matters of arbitration while the Civil Procedure Act and the rules made thereunder provide the general procedure to be followed in civil disputes. I do not see the basis upon which the general would prevail over or supplant the specific.

Additionally, application of the Civil Procedure Rules in arbitration proceedings is rather qualified by the words *"in so far it is appropriate"*, which in my view does not constitute a wholesale importation of the Civil Procedure Rules into arbitration proceedings.

Lastly rule 11 of the Arbitration Rules,which is really on the application of the rules of procedure, cannot override the clear provisions of the parent Arbitration Act, such as section 10, 32A, and 35 and confer a right of appeal. It is trite, under ***section 31*** of the ***Interpretation and General Provisions Act, cap. 2,*** that subsidiary legislation cannot be inconsistent with, or override the provisions of the parent Act.

In ***ANNE MUMBI HINGA V. VICTORIA NJOKI GATHARA (supra)***, this Court concluded as follows regarding application of rule 11 of the Arbitration Rules and the Civil Procedure Rules in arbitral proceedings:

> ***"In our view, Rule 11 of the Arbitration Rules 1997 has not imported the Civil Procedure Rules line, hook and sinker to regulate arbitrations under the Act. It is clear to us that no application of the Civil Procedure Rules would be regarded as appropriate if its effect would be to deny an award finality and speedy enforcement both of which are major objectives of arbitration."***

The respondent's fifth argument in support of the right of appeal to this Court draws from the overriding objectives under ***sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act, cap 9 Laws of Kenya***. The gist of those provisions is that the overriding objective of the appellate Jurisdiction Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals and that in determining appeals this Court seek to attain, among others, the just determination of cases.

In ***DOUGLAS MBUGUA MUNGAI V. HARRISON MUNYI, CA NO. NAI 167 OF 2010***, this Court stated as follows regarding the overriding objective:

> ***"We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly."***

Earlier in ***MRADURA SURESH KANTARIA V. SURESH NANALAL KANTARIA, CA NO. 277 OF 2005*** the Court had noted the contours and limits of the reach of the overriding objective in the following terms:

> ***"The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained."***

In my view, the overriding objective, which is first and foremost a case management tool, cannot be invoked to found a right of appeal to this Court where none had been conferred by statute. In this case, it is even much more difficult to fall back on the overriding objective as the basis of the right of appeal in view of the clear provisions of the Arbitration Act restricting intervention by courts in arbitrations.

The respondent's next contention is that in any event, ***Kimondo, J***. had granted the respondent leave to appeal to this Court against his order setting aside the arbitral award, and on that basis, the respondent's appeal before this Court was competent. The record shows that after the learned judge delivered the ruling on 1st December 2014, the respondent applied for leave to appeal, to which the appellant objected. The leaned judge ruled as follows on the application for leave to appeal:

"It is always good practice to allow such a party however good or poor his journey to the appellate court may look, to ventilate his rights. It will be a matter for the appellate court to determine whether the journey was a false start. In the result, I am inclined to grant leave to the respondent to file an appeal to the ruling of court of today's date."

It is clear to me that Kimondo, J. equivocated on the respondent's right of appeal to this court. While granting the respondent leave to appeal, the learned judge nevertheless stated that it was for this Court to determine whether indeed the respondent had a right of appeal. I think the short answer to the argument that the appellant's right of appeal to this court flows from the leave granted by Kimondo, J. is that where allowed, a party may appeal to this Court, either as of right or with leave of the High Court or this Court.

The best illustration of this reality is ***Article 164(4) (a) and (b)*** of the Constitution, on the right of appeal to the Supreme Court. Some matters are appealable to the Supreme Court as of right and others with leave (certification) of the Supreme Court or of this Court. The right of appeal to the Supreme Court with leave does not exist in a vacuum. It is premised on Article 163(4)(b) of the Constitution, which recognizes a right of appeal with leave or certificate. Another example illustrative of the same position is ***section 75(1)*** of the Civil Procedure Act.

The bottom line then is that there must be a provision of law that allows a party to appeal either as of right or with the leave of the Court. In this case, in addition to there being no

provision granting the right of appeal (as of right), there is also nonegranting the right of appeal to this Court with leave.

The last, and most intense point pressed by the respondent to establish a right of appeal to this Court under the Arbitration Act is founded on Article 164(3) of the Constitution, which provides as follows:

"The Court of Appeal has jurisdiction to hear appeals from-

a. ***the High Court; and***

b. ***any other court or tribunal as prescribed by an act of Parliament."***

Succinctly put, the respondent's contention is that Article 164(3) grants this Court jurisdiction to hear appeals from the High Court; that under that provision the respondent has a right of appeal to this Court; that the respondent's said right of appeal cannot be curtailed or otherwise limited by a statute like the Arbitration Act; that restriction of his right of appeal would impinge on his right to access justice guaranteed by Article 48 of the Constitution; that Articles 164(3) and Article 48 must be interpreted purposively, liberally and generously and as required by Article 259(1) of the Constitution; and that if so interpreted, the conclusion is inescapable that the respondent has a right of appeal to this Court.

On the interpretation of the Constitution, reliance was placed on the decision of the Court of Appeal of Tanzania in ***NDAYANABO V. ATTORNEY GENERAL*** ***(supra),*** the judgment of the Constitutional Court of Uganda in ***KIGULA & OTHERS V. ATTORNEY GENERAL [2005] 1 EA 132*** and the judgment of the High Court of Kenya in ***JUSTICE JOSEPH MBALU MUTAVA V. ATTORNEY GENERAL & ANOTHER HCP NO. 337 OF 2013*** to make the case for liberal and generous interpretation**.**

Although the issue of the jurisdiction of this Court was discussed at length in ***EQUITY BANK LTD V. WEST LINK MBO LTD CA NO. NAI 78 OF 2011***, a decision of five judges of this Court which was cited by both parties, it is important to remember that the issue whether Article 164(3) of the Constitution creates a right of appeal from decisions of the High Court in all and sundry cases was not directly before the Court. The point before the Court was whether this Court has jurisdiction under Article 164(3) of the Constitution to grant stay of execution pending the hearing and determination of an appeal. That is the reason why ***Githinji, JA*** expressed himself as follows:

> ***"Firstly, the submission by Mr. Ahmednassir that Article 164 (1) (should be 164(3) confers unlimited right of appeal which cannot be restricted by any statute is not only very broad but also has far reaching consequences. It affects the administration of justice and the function of the Court. The issue was not directly before the Court in these proceedings. It is merely to***

emphasize the submissions that the jurisdiction of the Court under Article 164 is different from what it was under the 1963 Constitution. The issue is not necessary for the determination of the preliminary objection and any finding on it would be obiter. In my view, the issue should be decided in appropriate proceedings where a question arises concerning the jurisdiction of the Court to entertain any specific appeal."

Nevertheless the *obiter* views expressed in that decision were broadly in agreement that Article 164(3) does not contemplate appeals to this Court from all decisions of the High Court and that a *right of appeal*, as distinct from the *jurisdiction* of this Court which is conferred by Article 164(3), must be conferred by statute.

Subsequently the issue arose directly in ***KAKUTA MAIMAI HAMISI V. PERIS PESI TOBIKO & 2 OTHERS (supra)*** where this Court was invited to hold that the Elections Rules made under the Elections Act, 2011 were null and void to the extent that they constricted or ousted the right of appeal to this Court. The Court expressed itself thus:

"***The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie."***

Later on in the same decision, the Court added:

"It is enough to say that the right of appeal must be statute or other law-based and so viewed, there is nothing doctrinally wrong or violative of the Constitution for such right to be circumscribed in ways that render certain decisions of courts below non-appealable."

I think the answer to the respondent's argument lies in the distinction that the appellant seeks to draw between *"jurisdiction"* and *"right of appeal."* Although the respondent dismissed the distinction as a distinction without a difference, I am convinced that there is a lot of merit in the differentiation. Because jurisdiction and right of appeal must coincide for a party to be heard on appeal in this Court, there has been a tendency to use the two terms as though they are interchangeable. Article 164(3) confers *jurisdiction* on this Court to hear appeals where there is *a right of appeal*. The conferment of jurisdiction on the Court by Article 164(3) to hear and determine appeals from the High Courtcannot be understood to create the right of appeal to this Court from all decisions of the High Court. The *right of appeal* as distinct from *jurisdiction* must be expressly conferred by the Constitution or by statute.

"Jurisdiction" connotes the power or authority of a court to hear and determine a case.

BLACK'S LAW DICTIONARY, 8th edition, 2007 defines ***appellate jurisdiction*** to mean:

"The power of a court to review and revise a lower court's decision."

An attribute of appellate jurisdiction is the power to reconsider a lower court's decision, to confirm it, reverse it, annul it, modify it or remit it back to the lower court for re-hearing.

"Right of appeal", on the other hand is granted by statute, and it is what enables an appellant to invoke the *jurisdiction* of an appellate court. The editors of ***STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES, 6TH EDITION, 2000***, after noting that a right of appeal is only by statute, state that the right of appeal:

> ***"is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below."***

To the same effect, the ***D. P. Mittal's TAXMANN'S LAW DICTIONARY*** , ***2007***, quoting the decision of the Supreme Court of India in ***SHIV SHAKTI CO-OP HOUSING V. SWARAJ DEVELOPERS AIR 2003 SC 2434,*** states as follows on the right of appeal:

> ***"The right of appeal inheres in no one. When conferred by statute it becomes a vested right. Right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the re-hearing in some way."***

The easiest illustration of the distinction that I can think of is the right of appeal to this Court from decisions of the High Court arising in election disputes. Although Article 164(3) of the Constitutions confers *jurisdiction* on this Court to hear appeals from the High Court, it is ***section 85A*** of the ***Elections Act, 2011***, which confers *the right of appeal* to this Court from decisions of the High Court in election disputes. That section provides as follows:

> ***"85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only…"***

If Article 164(3) confers the right of appeal, section 85A of the Elections Act, 2011 would have been absolutely unnecessary. Not only does section 85A of the Elections Act confer the right of appeal to this Court, but it also limits that right of appeal to issues of law only. In

FREDERICK OTIENO OUTA V. JARED ODOYO OKELLO & 4 OTHERS, SCP NO. 10 OF 2014, it was contended before the Supreme Court that section 85A of the Elections Act was an unconstitutional constriction of the unlimited *"right of appeal"* granted by Article 164(3) of the Constitution. That argument was promptly rejected by the Court, which upheld the limitation of the right of appeal under the Elections Act to issues of law. In my opinion, this decision must inevitably lead to the conclusion that the right of appeal to this Court in election disputes is conferred by section 85A of the Elections Act and in so conferring that right the legislature can legitimately restrict the issues that may be raised on appeal to this Court.

Okwengu, JA made the same point succinctly in ***BASIL CRITICOS V. IEBC & 2 OTHERS, CA NO. MSA 33 OF 2013 (MOMBASA)***. One of the issues before the Court was again the contention that section 85A of the Elections Act was ultra vires the Constitution. After holding that section 85A was complimentary to Article 164(3) of the Constitution, the learned judge stated:

"It should further be noted that the general jurisdiction to hear appeals, which is conferred on the Court by Article 164 of the Constitution is distinct from a right of appeal, which is

not automatic but is conferred through specific legislation, which in this case is the Elections Act."

Ultimately, I am persuaded that the decision of this Court in ***ANNE MUMBI HINGA V. VICTORIA NJOKI GATHARA*** ***(supra)*** represents the correct position in law on the issue raised in this application. The Court concluded as follows:

"We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act."

Accordingly, I find that there is merit in the application before us. I would allow the same and strike out ***Civil Appeal No. 61 of 2012*** with costs to the applicant.

Dated and delivered at Nairobi this 6th day of March, 2015.

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGIST

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWERA, MUSINGA, M'INOTI, & J. MOHAMMED, JJ.A.

CIVIL APPEAL (APPLICATION) NO. 61 OF 2012

BETWEEN

NYUTU AGROVET LIMITED ……..……...…….. APPLICANT/APPELLANT

AND

AIRTEL NETWORKS KENYA LIMITED ……..…….. RESPONDENT

(Application to strike out the record of appeal in a pending appeal from the ruling & order of the High Court of Kenya at Nairobi (Kimondo, J) dated 1st December, 2011

in

HC MISC APPLN NO. 400 OF 2011)

****

RULING OF J. MOHAMMED, J.A.:

I have had the advantage of reading in draft the Ruling of **Karanja, JA**. I am in full agreement with her reasoning and conclusions and, therefore, have nothing useful to add.

Dated and delivered at Nairobi this 6th day of March, 2015.

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR